



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91180; File No. SR-NYSEAMER-2021-11]

### **Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Amending the NYSE American Options Fee Schedule to Introduce Pricing for the Use of a New AON Functionality in Single-Leg and Complex Customer Best Execution Auctions**

February 22, 2021.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 16, 2021, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend the NYSE American Options Fee Schedule (“Fee Schedule”) to introduce pricing for the use of a new AON functionality in Single-Leg and Complex Customer Best Execution (“CUBE”) auctions. The Exchange proposes to implement the fee change effective February 16, 2021.<sup>4</sup> The proposed change is available on the

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<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> On January 27, 2021, the Exchange filed to implement the AON functionality for Complex CUBE auctions, which functionality was operative on an immediately effective basis retroactive to the date of filing given the waiver of the 30-day operative delay, as well as to make clarifications to the AON functionality for Single-Leg CUBE auctions. See Securities Exchange Release No. 91068 (February 5, 2021), 86 FR 9112 (February 11, 2021) (NYSEAMER–2021–06).

Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify the Fee Schedule to introduce pricing for the Exchange's newly approved optional all-or-none ("AON") functionality for larger-sized orders in Single-Leg and Complex CUBE auctions (together, "AON CUBE").<sup>5</sup> The Exchange proposes to introduce the pricing on February 16, 2021.

The Exchange proposes to define "AON CUBE Order" as a "Single-Leg CUBE Order of at least 500 contracts or a Complex CUBE Order of at least 500 contracts on the smallest leg, that is designated AON per Rule 971.1NY Commentary .05 and Rule 971.2NY Commentary .04, respectively."<sup>6</sup> Similarly, the Exchange proposes to define an AON Contra Order as "principal interest or solicited interest an Initiating Participant is using to guarantee the execution of an AON CUBE Order in a Single-Leg or Complex CUBE Auction."<sup>7</sup>

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<sup>5</sup> See Securities Exchange Release Nos. 90584 (December 7, 2020), 85 FR 80196 (December 11, 2020) (NYSEAMER-2020-64) (approving AON functionality for Single-Leg CUBE auction); 91068 (February 5, 2021), 86 FR 9112 (February 11, 2021) (NYSEAMER-2021-06) (approving AON functionality for Complex CUBE auction).

<sup>6</sup> See proposed Fee Schedule, Key Terms and Definitions. See generally Rules 971.1NY (regarding Single-Leg CUBE auctions) and 971.2NY (regarding Complex CUBE auctions)

<sup>7</sup> See proposed Fee Schedule, Key Terms and Definitions.

Section I.G. of the Fee Schedule sets forth the rates for per contract fees and credits for executions associated with CUBE Auctions. The Exchange proposes to include an additional table of fees and credits under Section I.G. to apply to certain contracts executed in AON CUBE Auctions, whether Single-Leg or Complex.<sup>8</sup>

The process for commencing an AON CUBE auction mirrors that of non-AON CUBE auctions. In particular, the AON CUBE auction process begins with the entry of an AON CUBE Order and a paired AON Contra Order. As with non-AON CUBE auctions, the Exchange similarly proposes to not charge for AON CUBE Order executions on behalf of a Customer or for Customer executions against AON CUBE Orders (i.e., Customer Request for Responses (“RFR”) to an AON CUBE Order). The Exchange proposes to charge \$0.20 per contract for non-Customer executions of AON CUBE Orders and Customer and non-Customer AON Contra Orders alike.

As with non-AON CUBE Auctions, the Exchange proposes to charge executions of non-Customer RFR Responses to an AON CUBE Auction \$0.50 per contract in Penny issues and \$1.05 per contract executed in non-Penny issues.

The Exchange proposes an Initiating Participant Credit for each contract in an AON Contra Order that does not trade with the AON CUBE Order because it is replaced in the auction, including when the AON Contra Order is replaced entirely by RFR Responses. As proposed, the Initiating Participant Credit for AON CUBE Orders would be \$0.30 per contract in Penny issues and \$0.70 per contract in non-Penny issues.

The Exchange also proposes an ACE Initiating Participant Rebate payable to Initiating Participants that are ATP Holders who qualify for Tiers 1, 2, 3, 4 or 5 of the ACE Program. The proposed \$0.12 per contract rebate would be paid to a qualifying Initiating Participant in an AON Single-Leg CUBE Auction for each of the first 5,000 contracts of an AON CUBE Order

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<sup>8</sup> See proposed Fee Schedule, Section I.G., CUBE Auction Fees & Credits (setting forth applicable fees and credits for AON Single-Leg and AON Complex CUBE Auctions).

executed and/or to a qualifying Initiating Participant in an AON Complex CUBE Auction for each of the first 1,000 contracts per leg of an AON CUBE Order executed.

The Exchange also proposes a Floor Broker Initiating Participant Rebate of \$0.12 per contract payable to Floor Brokers that execute a minimum of 2,500 contracts average daily volume (“ADV”) in AON CUBE Orders in either an AON Single-Leg or AON Complex CUBE auction.<sup>9</sup> As with the ACE Initiating Participant Rebate, the Floor Broker Initiating Participant Rebate is paid to a qualifying Initiating Participant for each contract in an AON CUBE Order and applies to each of the first 5,000 contracts of an AON CUBE Order executed in an AON Single-Leg CUBE Auction, or to the first 1,000 contracts per leg of an AON CUBE Order in an AON Complex CUBE Auction.

The Exchange’s fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those with similar auction functionalities and corresponding fees.<sup>10</sup> Thus, ATP Holders have a choice of where they direct their order flow, including electronic auction volume.

To the extent that the proposed fees and credits relating to the use of the AON CUBE auction functionality encourage ATP Holders to direct their order flow to the Exchange, all market participants stand to benefit from increased order flow, which promotes market depth, facilitates tighter spreads and enhances price discovery.

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<sup>9</sup> AON CUBE Orders executed by a Floor Broker on behalf of an ATP Holder may only be counted towards the Floor Broker’s eligibility for the Floor Broker Initiating Participant Rebate. An ATP Holder’s AON CUBE Orders that are executed by a Floor Broker are not eligible for the ACE Initiating Participant Rebate.

<sup>10</sup> See, e.g., Nasdaq ISE LLC (“Nasdaq ISE”), Options 7, Pricing Schedule, available here: <https://listingcenter.nasdaq.com/rulebook/ise/rules/ise-options-7> ([setting forth pricing for Solicited Order Mechanism and Complex Solicited Order Mechanism](#)); Cboe EDGX Exchange, Inc. (“Cboe EDGX”) fee schedule, available here: [https://www.cboe.com/us/options/membership/fee\\_schedule/edgx/](https://www.cboe.com/us/options/membership/fee_schedule/edgx/) ([setting forth pricing for Solicitation Auction Mechanism \(“SAM”\)](#)). See Statutory Basis below in “[The Proposed Rule Change is Reasonable](#)” section for discussion in greater detail, including [infra](#) notes 15 [sic] and 16.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>12</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

### The Proposed Rule Change is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>13</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>14</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2020, the

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>13</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

<sup>14</sup> The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics>.

Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.<sup>15</sup>

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees and rebates can have a direct effect on the ability of an exchange to compete for order flow, including auction volume.

The proposed rule change is designed to incent ATP Holders to direct liquidity to the Exchange in AON CUBE Auction executions, similar to other exchange programs with competitive pricing programs, thereby promoting market depth, price discovery and improvement and enhancing order execution opportunities for market participants. Specifically, the Exchange believes that the proposed fee structure for AON CUBE Orders is reasonably designed to incent ATP Holders to direct liquidity to the Exchange in the form of AON CUBE Auction executions, which increased order flow would improve the overall competitiveness and strengthen the market quality of the Exchange to the benefit of all market participants. The Exchange notes that the proposed structure of fees and credits for AON CUBE Auctions is reasonable because it is both consistent with fees and credits already in place for the same types of orders in Single-Leg and Complex CUBE auctions and is likewise within the range of fees and credits assessed by other exchanges employing similar fee structures for auction mechanisms.<sup>16</sup>

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<sup>15</sup> Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see id., the Exchange's market share in multiply-listed equity and ETF options increased from 8.06% for the month of November 2019 to 9.09% for the month of November 2020.

<sup>16</sup> See, e.g., Cboe EDGX fee schedule, supra note 10 (providing, for example, \$0.20 per contract fee for non-customer agency orders and \$0.20 per contract fee for non-customer contra orders in a SAM auction, in line with the Exchange's proposed \$0.20 per contract fee for non-Customer AON CUBE Orders and AON Contra Orders); Nasdaq ISE Pricing Schedule, supra note 10 (providing, for example, \$0.20 per contract fee for non-customer contra orders in Solicited Order Mechanism, in line with the Exchange's proposed \$0.20

Consistent with this proposal, competing options exchanges similarly offer different fees and credits for initiating orders, contra-side orders, and responders to an auction, and competing options exchanges likewise charge different rates for transactions in their price improvement mechanisms for Customers versus non-Customers.<sup>17</sup>

The Exchange also believes that it is reasonable for AON CUBE Orders and AON Contra Orders to be assessed lower fees than those providing RFR Responses, as structuring fees in this manner would incent market participants to direct orders to initiate AON CUBE Auctions (rather than simply respond to them). Further, the Exchange believes that the proposed fees for responding to AON CUBE Auctions would not deter market participants from providing price improvement, as they are consistent with fees for responding to a non-AON CUBE auction -- whether Single-Leg or Complex -- and are also consistent with fees charged to responders on options exchanges offering similar auction mechanisms.

The Exchange also believes that the qualification bases to achieve the ACE Initiating Participant Rebate are reasonably designed to encourage ATP Holders to utilize the optional AON CUBE functionality, which may lead to greater opportunities to trade -- and for price improvement -- for all participants. In addition, the Exchange believes that the proposed Floor Broker Initiating Participant Rebate would encourage Floor Brokers to use the AON CUBE mechanism to execute larger-size orders (both Single-Leg and Complex), which would also lead to greater opportunities to trade for all participants because such order flow will be exposed to additional market participants. The Exchange also believes that the proposed rebates are reasonably designed because they are (as mentioned above) similar to rebates currently available to participants in non-AON CUBE auctions and, to the extent the proposed rebates are higher

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per contract fee for non-Customer AON Contra Orders).

<sup>17</sup> See, e.g., Cboe EDGX fee schedule and Nasdaq ISE Pricing Schedule, supra note 10 (providing, for example, \$0.20 per contract fee for non-customer initiating orders and no fee for customer initiating orders, consistent with the Exchange's proposal).

than existing rebates, the Exchange believes that they represent a reasonable effort to incent the use of a new functionality.

Further, the Exchange believes the proposed fees and credits in connection with AON CUBE auctions would attract more volume and liquidity to the Exchange generally and would therefore benefit all market participants (including those that do not participate in auction mechanisms) through increased opportunities to trade at potentially improved prices as well as enhancing price discovery. To the extent the proposed fees and credits encourage greater volume and liquidity directed to the Exchange, the proposed changes would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants.

#### The Proposed Rule Change is an Equitable Allocation of Fees and Rebates

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange, and ATP Holders can opt to avail themselves of the auction mechanism or not. To the extent that the proposed change attracts more auction executions to the Exchange, this increased order flow would make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed fees and credits would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

The Exchange also believes that the proposed fees and credits are equitable because they would apply equally among Customers and would also apply equally among all non-Customers. With respect to Customers, all similarly situated orders for Customers are subject to the same transaction fee schedule. Furthermore, the Exchange believes that it is equitable that Customers be charged lower fees in AON CUBE Auctions than other market participants, as the exchanges in general have historically aimed to improve markets for investors and develop various features within market structure for customer benefit.<sup>18</sup> The Exchange may in some instances assess

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<sup>18</sup> The Exchange also notes that, as discussed above, certain non-Customers may be eligible



Customers lower or no transactions fees<sup>19</sup> because Customer order flow enhances liquidity on the Exchange for the benefit of all market participants, and customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may encourage a corresponding increase in order flow from other market participants.

The Exchange also believes that it is equitable for AON CUBE Orders and AON Contra Orders to be assessed lower fees than those providing RFR Responses, as structuring fees in this manner would incent market participants to direct orders to participate in AON CUBE Auctions. The Exchange believes that it is equitable to assess fees to responders to AON CUBE Auctions and credits to another participant to provide incentive for participants to submit order flow.

The Proposed Rule Change is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory because the proposed fees and credits would be available to all similarly-situated market participants on an equal and non-discriminatory basis. The Exchange's proposed fees and credits for AON CUBE Auctions are designed to encourage greater use of the AON CUBE Auction, which may lead to greater opportunities to trade -- and for price improvement -- for all participants.

To the extent that there is a differentiation between proposed fees assessed to Customers as compared to non-Customers, the Exchange believes that this is not unfairly discriminatory because preferential pricing to Customers is a long-standing options industry practice to incentivize increased Customer order flow through a fee and rebate schedule in order to attract professional liquidity providers. To the extent the proposed fees serve to enhance Customer volume on the Exchange, the Exchange believes increased Customer volume would attract liquidity, including Market Maker activity, by providing more trading opportunities. Increased

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for various credits and rebates, which would offset their transaction costs.

<sup>19</sup> For example, the Exchange offers Customers preferential rates for other trades executed on the Exchange such as for Qualified Contingent Cross orders.

Market Maker activity could, in turn, facilitate tighter spreads and increased order flow from other market participants, contributing to increased price discovery and overall enhanced quality of the market.

The Exchange also believes that the proposed fee structure is not unfairly discriminatory because it is based on the amount and type of business transacted on the Exchange, and ATP Holders are not obligated to participate in AON CUBE Auctions. Rather, the proposal is designed to encourage participants to utilize the Exchange as a primary trading venue (if they have not done so previously) or increase Electronic (auction) volume sent to the Exchange. To the extent that the proposed fees and credits are successful in incenting ATP Holders to utilize AON CUBE Auctions, this increased order flow would improve price discovery and make the Exchange a more competitive venue for order execution, which, in turn, would improve market quality for all market participants (including those that do not participate in AON CUBE Auctions).

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

**B. Self-Regulatory Organization's Statement on Burden on Competition**

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity for larger-sized orders to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting

Regulation NMS of fostering integrated competition among orders, which promotes “more efficient pricing of individual stocks for all types of orders, large and small.”<sup>20</sup>

*Intramarket Competition.* The proposed change is designed to attract order flow to the Exchange by offering competitive rates and credits based on increased volumes on the Exchange, which would enhance the quality of quoting and may increase the volumes of contracts traded on the Exchange. To the extent that this purpose is achieved, all of the Exchange’s market participants should benefit from the continued market liquidity. Enhanced market quality and increased transaction volume that results from the increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange believes that the proposed change to adopt fees and credits for the use of AON CUBE Auctions would not impose any burden on intramarket competition, but rather, would serve to promote intramarket competition by incentivizing order flow to the Exchange, and in particular, Customer orders, thereby providing for more opportunities to compete at improved prices.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its mechanisms and fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>21</sup> Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity and ETF

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<sup>20</sup> See Reg NMS Adopting Release, supra note 13, at 37499.

<sup>21</sup> See supra note 14.

options order flow. More specifically, in November 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.<sup>22</sup>

The Exchange believes that the proposed rule change reflects this competitive environment because it introduces new fees and rebates designed to encourage ATP Holders to direct trading interest to the Exchange, to provide liquidity, and to attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange believes that the proposed changes could promote competition between the Exchange and other execution venues, including those that currently offer similar auction mechanisms for larger-sized orders, by encouraging additional orders to be sent to the Exchange for execution.<sup>23</sup>

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>24</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>25</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or

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<sup>22</sup> Based on OCC data, supra note 15, the Exchange's market share in equity- and ETF-based options increased from 8.06% for the month of November 2019 to 9.09% for the month of November 2020.

<sup>23</sup> See, e.g., supra note 10 (regarding Nasdaq ISE's Solicited Order Mechanism and Complex Solicited Order Mechanism).

<sup>24</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>25</sup> 17 CFR 240.19b-4(f)(2).

otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>26</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEAMER-2021-11 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090.

All submissions should refer to File No. SR-NYSEAMER-2021-11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549, on official business days between the hours of 10:00 a.m. and 3:00

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<sup>26</sup> 15 U.S.C. 78s(b)(2)(B).

p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSEAMER-2021-11, and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021-04177 Filed: 2/26/2021 8:45 am; Publication Date: 3/1/2021]

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<sup>27</sup> 17 CFR 200.30-3(a)(12).